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AXIS SURPLUS INSURANCE COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

EDWARD M. WEAVER, an individual,
Plaintiff,
vs.
AXIS SURPLUS INSURANCE
COMPANY, an Illinois corporation,
Defendant.

Case No. 2:13-cv-06439-GW-RZ

**DEFENDANT AXIS SURPLUS
INSURANCE COMPANY'S
AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT**

COMES NOW Defendant, AXIS SURPLUS INSURANCE COMPANY, (hereinafter, “AXIS”), and answers Plaintiff EDWARD M. WEAVER’s complaint on file herein (hereinafter, the “Complaint”) as follows:

THE PARTIES

1. Answering paragraph 1, AXIS admits that Plaintiff was formerly a resident of the State of New York, that Plaintiff formerly served as president and chief executive officer of Multivend, LLC, that Multivend, LLC formerly had its principal place of business and only office in the State of New York, and that Multivend, LLC is a now-defunct vending machine sales company. AXIS is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in paragraph 1, and on that basis denies the remainder of the allegations contained therein, generally and specifically.

2. Answering paragraph 2, AXIS admits that it is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business located in the State of Georgia, and that AXIS issued the insurance policy that is the subject of the above-captioned action. AXIS is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 with respect to Plaintiff's knowledge regarding AXIS's business operations, and, on that basis, denies the remainder of the allegations contained therein, generally and specifically.

JURISDICTION AND VENUE

3. Answering paragraph 3, to the extent that paragraph 3 contains legal conclusions, questions of fact for the trier of fact and/or questions of law for the

1 Court, AXIS is not required to admit or deny the same. AXIS admits that it is a
2 corporation organized and existing under the laws of the State of Illinois, with its
3 principal place of business located in the State of Georgia. AXIS is without
4 knowledge or information sufficient to form a belief as to the truth of the
5 remainder of the allegations contained in paragraph 3, and on that basis denies the
6 remainder of the allegations contained therein, generally and specifically.
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9 4. Answering paragraph 4, to the extent that paragraph 4 contains legal
10 conclusions, questions of fact for the trier of fact and/or questions of law for the
11 Court, AXIS is not required to admit or deny the same. AXIS denies that the
12 insurance policy that is the subject of the above-captioned action was entered into
13 in California. AXIS is without knowledge or information sufficient to form a
14 belief as to the truth of the remainder of the allegations contained in paragraph 4,
15 and on that basis denies the remainder of the allegations contained therein,
16 generally and specifically.

20 5. Answering paragraph 5, to the extent that paragraph 5 contains legal
21 conclusions, questions of fact for the trier of fact and/or questions of law for the
22 Court, AXIS is not required to admit or deny the same. AXIS denies any and all of
23 Plaintiff's characterizations of the Policy contained in paragraph 5 and respectfully
24 refers the Court to the Policy, the language of which speaks for itself. AXIS denies
25 any and all remaining allegations contained in paragraph 5.
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6. Answering paragraph 6, to the extent that paragraph 6 contains legal conclusions, questions of fact for the trier of fact and/or questions of law for the Court, AXIS is not required to admit or deny the same. AXIS denies any and all remaining allegations contained in paragraph 6, except admits that AXIS does not have its principal place of business in the State of California.

GENERAL ALLEGATIONS

7. Answering paragraph 7, AXIS admits that, in 2010, it issued a Privatus Policy Number ENN588818 (the “Policy”) to Multivend, LLC effective for the policy period of February 20, 2010 to February 20, 2011, and that the end of the policy period was subsequently extended to February 20, 2014, by virtue of the addition of an Endorsement to the Policy with an effective date of February 20, 2011. AXIS denies that the document attached to the Complaint as Exhibit “A” reflects a true and accurate copy of the Policy.

8. Answering paragraph 8, to the extent that paragraph 8 contains legal conclusions, questions of fact for the trier of fact and/or questions of law for the Court, AXIS is not required to admit or deny the same. AXIS admits that, subject to all other terms, conditions, limitations, exclusions and Endorsements of the Policy, Multivend, LLC, Plaintiff, and Lawrence A. Kaplan, Scott M. Doumas, Mark Benowitz, Richard R. Goldberg, Richard Linick, Paul E. Raia and Howard S. Strauss are each an “Insured” under the Policy. AXIS denies any and all of

1 Plaintiff's characterizations of the Policy contained in paragraph 8 and respectfully
2 refers the Court to the Policy, the language of which speaks for itself. AXIS denies
3 any and all remaining allegations contained in paragraph 8.
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5 9. Answering paragraph 9, AXIS denies any and all of Plaintiff's
6 characterizations of the Policy contained in paragraph 9 and respectfully refers the
7 Court to the Policy, the language of which speaks for itself. AXIS denies any and
8 all remaining allegations contained in paragraph 9.
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10 10. Answering paragraph 10, AXIS admits that an indictment (the
11 "Indictment") filed on October 2, 2012 was unsealed in the United States District
12 Court for the Southern District of Florida on or about October 10, 2012, that
13 Plaintiff and others were named as defendants in the Indictment, and that Exhibit
14 "B" to the Complaint is an accurate copy of the Indictment. AXIS denies any and
15 all of Plaintiff's characterizations of the Indictment contained in paragraph 10 and
16 respectfully refers the Court to the Indictment, which speaks for itself. AXIS
17 denies any and all remaining allegations contained in paragraph 10.
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22 11. Answering paragraph 11, to the extent that paragraph 11 contains
23 legal conclusions, questions of fact for the trier of fact and/or questions of law for
24 the Court, AXIS is not required to admit or deny the same. AXIS denies the
25 allegations contained in paragraph 11, except admits that Exhibit "C" to the
26 Complaint is an accurate copy of a letter dated October 25, 2012 that AXIS
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1 received from Jenner & Block LLP. AXIS denies that Plaintiff tendered the
2 Indictment to AXIS for a defense “[o]n or about October 25, 2012,” and further
3 denies that Exhibit “C” to the Complaint contains a “tender letter.”
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5 12. Answering paragraph 12, to the extent that paragraph 12 contains
6 legal conclusions, questions of fact for the trier of fact and/or questions of law for
7 the Court, AXIS is not required to admit or deny the same. AXIS admits that it
8 denied coverage for the Indictment, admits that Exhibit “D” to the Complaint is an
9 accurate copy of a letter dated December 11, 2012 that counsel acting on behalf of
10 AXIS sent to Plaintiff through his counsel, Martin J. Auerbach, Esq. (among other
11 recipients), and admits that Exhibit “E” to the Complaint is an accurate copy of a
12 letter dated November 26, 2007 that the Securities Division of the Office of the
13 Attorney General of Maryland (the “Maryland AG”) sent to Multivend, LLC and
14 Plaintiff in particular. AXIS denies any and all of Plaintiff’s characterizations of
15 AXIS’s December 11, 2012 letter and/or the Maryland AG’s November 26, 2007
16 letter, contained in paragraph 12 and respectfully refers the court to the contents of
17 those letters, which speak for themselves. AXIS denies any and all remaining
18 allegations contained in paragraph 12.
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20 13. Answering paragraph 13, to the extent that paragraph 13 contains
21 legal conclusions, questions of fact for the trier of fact and/or questions of law for
22 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
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1 all of Plaintiff's characterizations of AXIS's December 11, 2012 letter, contained
2 in paragraph 13 and respectfully refers the court to the contents of that letter, which
3 speaks for itself. AXIS further denies any and all of Plaintiff's characterizations of
4 the Policy contained in paragraph 13 and respectfully refers the Court to the
5 Policy, the language of which speaks for itself. AXIS denies any and all remaining
6 allegations contained in paragraph 13.

9 14. Answering paragraph 14, to the extent that paragraph 14 contains
10 legal conclusions, questions of fact for the trier of fact and/or questions of law for
11 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
12 all of Plaintiff's characterizations of AXIS's December 11, 2012 letter contained in
13 paragraph 14 and respectfully refers the Court to the contents of that letter, which
14 speaks for itself. AXIS further denies any and all of Plaintiff's characterizations of
15 the Policy contained in paragraph 14 and respectfully refers the Court to the
16 Policy, the language of which speaks for itself. AXIS denies any and all remaining
17 allegations contained in paragraph 14.

22 15. Answering paragraph 15, to the extent that paragraph 15 contains
23 legal conclusions, questions of fact for the trier of fact and/or questions of law for
24 the Court, AXIS is not required to admit or deny the same. AXIS admits that
25 Exhibit "F" to the Complaint is an accurate copy of a letter dated January 18, 2013,
26 that counsel acting on behalf of Plaintiff sent to AXIS through its counsel in
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1 response to AXIS's December 11, 2012 letter. AXIS denies any and all of
2 Plaintiff's characterizations of his counsel's January 18, 2013 letter contained in
3 paragraph 15 and respectfully refers the Court to the contents of that letter, which
4 speaks for itself. AXIS denies any and all remaining allegations contained in
5 paragraph 15.
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7 16. Answering paragraph 16, to the extent that paragraph 16 contains
8 legal conclusions, questions of fact for the trier of fact and/or questions of law for
9 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
10 all of Plaintiff's characterizations of his counsel's January 18, 2013 letter, AXIS's
11 December 11, 2011 letter, and the Maryland AG's November 26, 2007 letter
12 contained in paragraph 16 and respectfully refers the court to the contents of those
13 letters, which speak for themselves. AXIS denies any and all remaining
14 allegations contained in paragraph 16.
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16 17. Answering paragraph 17, to the extent that paragraph 17 contains
17 legal conclusions, questions of fact for the trier of fact and/or questions of law for
18 the Court, AXIS is not required to admit or deny the same. AXIS admits that
19 Exhibit "G" to the Complaint is an accurate copy of a letter dated January 18, 2013
20 that counsel acting on behalf of AXIS sent to Plaintiff through his counsel (among
21 others) in response to prior correspondence that AXIS received from Plaintiff's
22 counsel and others. AXIS denies any and all of Plaintiff's characterizations of
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1 AXIS's January 18, 2013 letter contained in paragraph 17 and respectfully refers
2 the Court to the contents of that letter, which speaks for itself. AXIS denies any
3 and all remaining allegations contained in paragraph 17.
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5 18. Answering paragraph 18, to the extent that paragraph 18 contains
6 legal conclusions, questions of fact for the trier of fact and/or questions of law for
7 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
8 all of Plaintiff's characterizations of Plaintiff's counsel's January 18, 2013 letter,
9 the Maryland AG's November 26, 2007 letter, and AXIS December 11, 2012 and
10 February 19, 2013 letters contained in paragraph 18 and respectfully refers the
11 Court to the contents of those letters, which speak for themselves. AXIS denies
12 any and all remaining allegations contained in paragraph 18.
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15 19. Answering paragraph 19, to the extent that paragraph 19 contains
16 legal conclusions, questions of fact for the trier of fact and/or questions of law for
17 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
18 all of Plaintiff's characterizations of Plaintiff's counsel's January 18, 2013 letter
19 and the Maryland AG's November 26, 2007 letter contained in paragraph 20 and
20 respectfully refers the Court to the contents of those letters, which speak for
21 themselves. AXIS denies any and all remaining allegations contained in paragraph
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1 20. Answering paragraph 20, to the extent that paragraph 20 contains
2 legal conclusions, questions of fact for the trier of fact and/or questions of law for
3 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
4 all of Plaintiff's characterizations of Plaintiff's counsel's January 18, 2013 letter
5 and the Maryland AG's November 26, 2007 letter contained in paragraph 20 and
6 respectfully refers the Court to the contents of those letters, which speak for
7 themselves. AXIS denies any and all remaining allegations contained in paragraph
8
9 20.

12 21. Answering paragraph 21, to the extent that paragraph 21 contains
13 legal conclusions, questions of fact for the trier of fact and/or questions of law for
14 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
15 all of Plaintiff's characterizations of Plaintiff's counsel's January 18, 2013 letter,
16 AXIS's December 11, 2012 letter and the Maryland AG's November 26, 2007
17 letter contained in paragraph 21 and respectfully refers the Court to the contents of
18 those letters, which speak for themselves. AXIS denies any and all remaining
19 allegations contained in paragraph 21.

23 22. Answering paragraph 22, to the extent that paragraph 22 contains
24 legal conclusions, questions of fact for the trier of fact and/or questions of law for
25 the Court, AXIS is not required to admit or deny the same. AXIS denies any and
26 all of Plaintiff's characterizations of the Policy contained in paragraph 22 and

1 respectfully refers the Court to the Policy, the language of which speaks for itself.
2 AXIS further denies any and all of Plaintiff's characterizations of Plaintiff's
3 counsel's January 18, 2013 letter, and AXIS's December 11, 2012 and February
4 19, 2013 letters contained in paragraph 22, and respectfully refers the Court to the
5 contents of those letters, which speak for themselves. AXIS denies any and all
6 remaining allegations contained in paragraph 22.

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9 23. Answering paragraph 23, AXIS denies any and all of Plaintiff's
10 characterizations of AXIS's February 19, 2013 letter contained in paragraph 23
11 and respectfully refers the Court to the contents of that letter, which speaks for
12 itself. AXIS admits that it has denied coverage to Plaintiff and Lawrence Kaplan,
13 Scott Doumas, Mark Benowitz, Richard Goldberg, Richard Linick, Paul Raia and
14 Howard Strauss for the Indictment. AXIS denies any and all remaining allegations
15 contained in paragraph 23.

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19 **FIRST CAUSE OF ACTION**

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21 **(BREACH OF INSURANCE CONTRACT – DUTY TO DEFEND)**

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24 24. Answering paragraph 24, to the extent that paragraph 24 contains
legal conclusions, questions of fact for the trier of fact and/or questions of law for
the Court, AXIS is not required to admit or deny the same. AXIS repeats, re-
alleges and incorporates by reference paragraphs 1 through 23 of this Answer as if
fully set forth at length herein.

1 25. Answering paragraph 25, to the extent that paragraph 25 contains
2 legal conclusions, questions of fact for the trier of fact and/or questions of law for
3 the Court, AXIS is not required to admit or deny the same. AXIS admits that it
4 issued an insurance Policy to Multivend, LLC, and that, subject to all other terms,
5 conditions, limitations, exclusions and Endorsements of the Policy, Plaintiff is an
6 “Insured Individual” under that Policy. AXIS is without knowledge or information
7 sufficient to form a belief as to the truth of the remainder of the allegations
8 contained in paragraph 25, and on that basis denies the remainder of the allegations
9 contained therein, generally and specifically.

10 26. Answering paragraph 26, to the extent that paragraph 26 contains
11 legal conclusions, questions of fact for the trier of fact and/or questions of law for
12 the Court, AXIS is not required to admit or deny the same. AXIS admits that
13 Plaintiff has sought coverage under the Policy for the Indictment. AXIS is without
14 knowledge or information sufficient to form a belief as to the truth of the
15 remainder of the allegations contained in paragraph 26, and on that basis denies the
16 remainder of the allegations contained therein, generally and specifically.

17 27. Answering paragraph 27, AXIS contends that paragraph 27 consists of
18 legal conclusions, questions of fact for the trier of fact and/or questions of law for
19 the Court to which no response is required. To the extent that any response is
20 required, AXIS denies that it has any coverage obligations, whether to defend
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1 Plaintiff or otherwise, with respect to the Indictment, and AXIS further denies that
2 it ever received a letter dated October 25, 2013 sent by Plaintiff or any legal
3 representative of Plaintiff. AXIS denies any and all remaining allegations
4 contained in paragraph 27.

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6 28. Answering paragraph 28, AXIS contends that paragraph 28 consists of
7 legal conclusions, questions of fact for the trier of fact and/or questions of law for
8 the Court to which no response is required. To the extent that any response is
9 required, AXIS denies each and every allegation contained in paragraph 28.

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11 29. Answering paragraph 29, AXIS contends that paragraph 29 contains
12 legal conclusions, questions of fact for the trier of fact and/or questions of law for
13 the Court to which no response is required. To the extent that any response is
14 required, AXIS denies each and every allegation contained in paragraph 29.

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17 **SECOND CAUSE OF ACTION**

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19 **(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR**

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21 **DEALING – INSURANCE BAD FAITH)**

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23 30. Answering paragraph 30, to the extent that paragraph 30 contains
24 legal conclusions, questions of fact for the trier of fact and/or questions of law for
25 the Court, AXIS is not required to admit or deny the same. To the extent that any
26 response is required, AXIS repeats, re-alleges and incorporates by reference
27 paragraphs 1 through 29 of this Answer as if fully set forth at length herein.
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1 31. Answering paragraph 31, to the extent that paragraph 31 contains
2 legal conclusions, questions of fact for the trier of fact and/or questions of law for
3 the Court, AXIS is not required to admit or deny the same. AXIS admits that it
4 issued an insurance Policy to Multivend, LLC, and that, subject to all other terms,
5 conditions, limitations, exclusions and Endorsements of the Policy, Plaintiff is an
6 “Insured Individual” under that Policy. AXIS is without knowledge or information
7 sufficient to form a belief as to the truth of the remainder of the allegations
8 contained in paragraph 31, and on that basis denies the remainder of the allegations
9 contained therein, generally and specifically.

10 32. Answering paragraph 32, to the extent that paragraph 32 contains
11 legal conclusions, questions of fact for the trier of fact and/or questions of law for
12 the Court, AXIS is not required to admit or deny the same. AXIS admits that
13 Plaintiff has sought coverage under the Policy for the Indictment. AXIS is without
14 knowledge or information sufficient to form a belief as to the truth of the
15 remainder of the allegations contained in paragraph 32, and on that basis denies the
16 remainder of the allegations contained therein, generally and specifically.

17 33. Answering paragraph 33, AXIS contends that paragraph 33 consists of
18 legal conclusions, questions of fact for the trier of fact and/or questions of law for
19 the Court to which no response is required. To the extent that any response is
20 required, AXIS denies that it has any coverage obligations, whether to defend
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1 Plaintiff or otherwise, with respect to the Indictment, and AXIS further denies that
2 it ever received a letter dated October 25, 2013 sent by Plaintiff or any legal
3 representative of Plaintiff. AXIS denies any and all remaining allegations
4 contained in paragraph 33.

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6 34. Answering paragraph 34, AXIS contends that paragraph 34 consists of
7 legal conclusions, questions of fact for the trier of fact and/or questions of law for
8 the Court to which no response is required. To the extent that any response is
9 required, AXIS denies each and every allegation contained in paragraph 34.

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11 35. Answering paragraph 35, AXIS contends that paragraph 35 contains
12 legal conclusions, questions of fact for the trier of fact and/or questions of law for
13 the Court to which no response is required. To the extent that any response is
14 required, AXIS denies each and every allegation contained in paragraph 35.

15 **THIRD CAUSE OF ACTION**

16 **(DECLARATORY RELIEF)**

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18 36. Answering paragraph 36, to the extent that paragraph 36 contains
19 legal conclusions, questions of fact for the trier of fact and/or questions of law for
20 the Court, AXIS is not required to admit or deny the same. To the extent that any
21 response is required, AXIS repeats, re-alleges and incorporates by reference
22 paragraphs 1 through 35 of this Answer as if fully set forth at length herein.

1 37. Answering paragraph 37, AXIS contends that paragraph 37 consists of
2 legal conclusions, questions of fact for the trier of fact and/or questions of law for
3 the Court to which no response is required. To the extent that any response is
4 required, AXIS is without knowledge or information sufficient to form a belief as
5 to the truth of the allegations contained in paragraph 37, and on that basis denies
6 each and every allegation contained therein, generally and specifically.
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9 38. Answering paragraph 38, AXIS contends that paragraph 38 consists of
10 legal conclusions, questions of fact for the trier of fact and/or questions of law for
11 the Court to which no response is required. To the extent that any response is
12 required, AXIS denies each and every allegation contained in paragraph 38.
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15 39. Answering paragraph 39, AXIS contends that paragraph 39 consists of
16 legal conclusions, questions of fact for the trier of fact and/or questions of law for
17 the Court to which no response is required. To the extent that any response is
18 required, AXIS denies each and every allegation contained in paragraph 39.
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PRAAYER FOR RELIEF

FIRST CAUSE OF ACTION

(BREACH OF INSURANCE CONTRACT – DUTY TO DEFEND)

25 40. AXIS denies that Plaintiff is entitled to any relief whatsoever under
26 any cause of action against AXIS and on that basis denies the prayer for relief
27 including, but not limited to, paragraphs 1 through 4.
28

SECOND CAUSE OF ACTION

(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING – INSURANCE BAD FAITH)

41. AXIS denies that Plaintiff is entitled to any relief whatsoever under any cause of action against AXIS and on that basis denies the prayer for relief including, but not limited to, paragraphs 1 through 6.

THIRD CAUSE OF ACTION

(DECLARATORY RELIEF)

42. AXIS denies that Plaintiff is entitled to any relief whatsoever under any cause of action against AXIS and on that basis denies the prayer for relief including, but not limited to, paragraphs 1 through 5.

AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

43. AXIS sets forth its separate and distinct defenses to apprise Plaintiff of certain potentially applicable defenses to any and all claims. AXIS reserves the right to add or remove any affirmative defenses to Plaintiff's complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

44. Plaintiff's Complaint fails to state a claim against AXIS upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

45. Plaintiff's claims are barred, in whole or in part, by the terms, conditions, endorsements and exclusions of the Policy, and by application of law and principles of equity. AXIS hereby expressly gives notice of and reserves the right to rely upon all the terms, conditions, endorsements and exclusions of the Policy to deny or limit coverage on additional or different grounds as discovery reveals.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

46. Plaintiff's claims should be dismissed because Plaintiff has failed to perform all of the obligations of the Insured under the insurance policy or policies, and the terms and conditions precedent to coverage expressed therein, and/or to fully comply with the insurance policy or policies, including but not limited to the Insured's obligations as to notice, assistance, consent and cooperation.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

47. Plaintiff is equitably estopped from obtaining coverage, claiming any right for damages or any relief against AXIS based on Plaintiff's own conduct which AXIS relied on to its detriment.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

48. All claims made by Plaintiff are barred in whole or in part by the applicable statute of limitations.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

1 49. Plaintiff has failed to join an indispensable party or parties.

2 **AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

3 50. All claims made by Plaintiff are barred in whole or in part by the
4 equitable doctrine of laches.

5 **AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

6 51. All claims made by Plaintiff are barred in whole or in part by the
7 equitable doctrine of unclean hands.

8 **AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

9 52. By its acts and omissions, Plaintiff has waived any and all rights at
10 issue in the Complaint.

11 **AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

12 53. All claims, in whole or in part, are barred by the doctrine of res
13 judicata.

14 **AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

15 54. Plaintiff's conduct materially increased AXIS's risk in violation of the
16 terms, conditions, limitations and exclusions in the insurance policy and/or policies
17 issued by AXIS.

18 **AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

19 55. The Plaintiff's rights and claims, if any, are barred by negligent and/or
20 fraudulent misrepresentations that AXIS relied upon to its detriment.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

56. Plaintiff's claims are barred because the underlying
Indictment/criminal action does not constitute a Claim first made during the Policy
Period as required by the relevant Insuring Agreement of the Policy.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

57. Plaintiff's claims are barred because the underlying Indictment/criminal action is otherwise wholly-excluded from coverage pursuant to the Exclusion set forth at Section IV.A.2. of the Policy.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

58. Plaintiff's claims are barred, in whole or in part, by other and additional terms, conditions, limitations and exclusions in the Policy including, but not limited to the following:

- a. The Insuring Agreement set forth at Section I.(A) of the Policy;
 - b. The Exclusion set forth at Section IV.A.5.a. of the Policy, as amended by Endorsement No. 1;
 - c. The Exclusion set forth at Section IV.A.5.b. of the Policy, as amended by Endorsement No. 1;
 - d. Section VIII.D. of the Policy, entitled “Other Insurance”; and/or
 - e. The “Loss” definition at Section III.A.7. of the Policy, which provides that the Policy does not provide coverage for, among

1 other things, fines, penalties, and matters uninsurable under the
2 law pursuant to which this Policy shall be construed.
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AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

5 59. AXIS did not breach any obligation allegedly owed to Plaintiff.
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AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

8 60. Plaintiff has failed to mitigate its damages.
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AS AND FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

11 61. In the event that liability is entered against AXIS, AXIS is entitled to
12 a set off for any uncovered claims and/or for amounts sought in this action which
13 have been or will be collected from any other source.
14

AS AND FOR A NINTEENTH AFFIRMATIVE DEFENSE

15 62. Plaintiff's claims are barred or limited under the known loss, moral
16 hazard, loss in progress, and/or fortuity doctrines.
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AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE

19 63. AXIS is not liable for monetary obligations assumed or voluntarily
20 paid by Plaintiff.
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22

AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

23 64. AXIS is not responsible for the Plaintiff's attorneys' fees and costs
24 incurred in bringing this Complaint.
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26

AS AND FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

65. AXIS reserves the right to plead additional affirmative defenses which may arise upon receiving additional information regarding the matters alleged in the Complaint, through discovery or otherwise.

WHEREFORE, Defendant AXIS respectfully requests that this Court enter judgment as follows:

1. Dismissing Plaintiff's Complaint;
 2. Granting to the Defendant all costs, expenses, and disbursements resulting from this litigation, including attorneys' fees; and
 3. Awarding such other and further relief as this Court deems just, necessary, and proper.

Respectfully submitted,

DATED: October 18, 2013

KAUFMAN BORGEEST & RYAN LLP

By: /s/ Jeffrey S. Whittington

JEFFREY S. WITTINGTON, ESQ.

Attorneys for Defendant

Attorneys for Defendant

Attorneys for Defendant

AXIS SURPLUS INSURANCE

AXIS SURPLUS INSURANCE

AXIS SURPLUS INSURANCE COMPANY

1

PROOF OF SERVICE

2 **UNITED STATES DISTRICT COURT**

3 **CENTRAL DISTRICT OF CALIFORNIA –WESTERN DIVISION**

4 I declare as follows:

5 I am employed in the County of Los Angeles, California. I am over the age
6 of 18 years, and not a party to the within action; my business address is 23975 Park
7 Sorrento, Suite 370, Calabasas, California 91302. I am readily familiar with my
8 employer's business practice for collection and processing of correspondence for
9 mailing with the United States Postal Service. I am aware that on motion of the
party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing affidavit.

10 On October 18, 2013, I served a true and correct copy, with all exhibits, of
11 the following document(s) described as follows:

12 **DEFENDANT AXIS SURPLUS INSURANCE COMPANY'S AMENDED
ANSWER TO PLAINTIFF'S COMPLAINT**

13 [x] via service through the CM/ECF system. (*eService*)

14 **Ezra D Landes**

15 Spertus, Landes & Umhofer, LLP
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16 Los Angeles, CA 90025
17 ezra@spertuslaw.com

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18 **Matthew Donald Umhofer**

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20 1990 South Bundy Dr., Suite 705
21 Los Angeles, CA 90025
22 matthew@spertuslaw.com
suzie@spertuslaw.com;
23 chris@spertuslaw.com

24 I certify under penalty of perjury under the laws of the State of California
25 that the foregoing is true and correct and that this declaration was executed on
26 October 18, 2013, at Calabasas, California.

27 By: /s/ Sharyn Waldrop
28 Signature of Declarant

By: Sharyn Waldrop
Name of Declarant